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In the Supreme Court
of the United States

October Term, 1945

No. 112

B. T. WALLER,

Petitioner,

vs.

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON, a corporation,

Respondent.

PETITION FOR REHEARING AND MOTION TO VACATE ORDER DENYING CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PART I. PETITION FOR REHEARING AND MOTION TO VACATE ORDER DENYING CERTIORARI.

Your petitioner, B. T. Waller, hereby respectfully petitions the Court to rehear this cause and to recon-

sider its action in denying petitioner's request for writ of certiorari to review a judgment entered in this cause of the Supreme Court of the State of Oregon, and further moves this Court that its order entered herein on October 14, 1946, denying writ of certiorari be vacated.

PART II: STATEMENT AND BRIEF OF PETITIONER.

(1) Introductory Statement.

On May 18, 1946, petitioner filed with this Court his petition for writ of certiorari to the Supreme Court of the State of Oregon with supporting brief combined therein (Rule 38, Sec. 2) together with the duly certified record of the Oregon Supreme Court, and on May 20, 1946, a copy of such petition, brief and record were served upon Respondent. No opposing brief was filed by Respondent. On October 14, 1946, this Court entered its order denying petition for writ of certiorari.

(2) Oregon Supreme Court decision in conflict with decisions of this Court and denies petitioner right to trial by jury.

The decision of the Oregon Supreme Court in this cause which is under the Federal Employers' Liability Act as Amended (45 U.S.C.A. Sec. 51-54), is contrary to the decisions of the Supreme Court of the United

States in that a reading of the decision demonstrates that it is trying the cause **de novo** as a jury on so much of the testimony it desired to quote verbatim interspersed with interpolations reciting what it concluded other testimony showed. It denominated petitioner's testimony in the main as scintilla evidence and inferences, ruled out the ground of negligence on slippery and muddy condition at the point where plaintiff was injured, on its claim there was no evidence supporting it (R. 93) and upon which there was substantial evidence sustaining it (T. of T. 183-185) and in addition thereto it weighed the testimony of petitioner and his witnesses against the testimony offered by Respondent, and then substituted its judgment for that of the jury. Its decision conflicts with the decisions of this Court hereinafter cited, in passing on **"duty of employer to employe under Federal Employers' Liability Act," "circumstantial evidence and absence of eye witnesses"**, defining the **"quantum of evidence"**, the term of **"speculation and conjecture"**, **"function of the jury"** and the **"right of the appellate court as a reviewing court"**.

Lavender, Admx. v. Kurn, et al, etc., Vol. 90 L. ed. Ad. Op. No. 11, p. 692.
Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29; 88 L. ed. 520.
Bailey v. Central Vt. R. Co., 319 U.S. 350; 87 L. ed. 1444.
Tiller v. Atlantic Coast R. Co., 318 U.S. 54; 87 L. ed. 610.
N. Y. Central R. R. Co. v. Marcone, 281 U.S. 345; 74 L. ed. 892.

The opinion and judgment of the Oregon Supreme Court was rendered and entered on February 26, 1946 (R. 102, 103) and in deference to such court attention is called to the fact that the case of Lavender, Admx. v. Kurn, et al, supra, which is quoted from in Plaintiff's petition for certiorari, was decided on March 25, 1946, seven Justices concurring, one dissenting and one absent, one month subsequent to the decision of the Oregon Supreme Court, and had such court had the advantage of this decision its opinion should have been favorable to petitioner. The decision of the Oregon Supreme Court has denied petitioner his right to trial by jury accorded him under the system of Federal Jurisprudence and remedy afforded him by the Federal Employers' Liability Act as construed by the aforesaid late decisions of this Court, as a review of petition for certiorari and brief in support thereof together with the transcript of testimony, all of which is hereby referred to and made a part hereof, shows that there was substantial evidence on every ground of negligence claimed by petitioner, and if such decision is permitted to stand it establishes a precedent giving not only the Oregon Supreme Court but other reviewing Courts throughout the Nation the right to try **de novo** on the transcript of testimony all cases arising under the Federal Employers Liability Act. The local procedure of the Supreme Court of Oregon in actions at law is governed by the following amendment of the Oregon Constitution and permits of no re-examination of fact questions unless there is no

evidence:

Amendment Art. VII,

"Sec. 3 * * * In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is **no evidence** to support the verdict." (Bold face type ours)

(3) Time element does not preclude issuance of certiorari.

As indicated above, the petition in this case was filed in ample time (28 U.S.C.A. Sec. 350). This Court upon this petition for rehearing may consider and revise its order as issued in this case on October 14, 1946. The case is still before this Court and the Court possesses adequate power to grant the request of petitioner, particularly in the light of facts disclosed in this statement.

(4) Conclusion

For the reasons stated in petition for certiorari and brief, and additional reasons set forth in this petition and motion, petitioner respectfully submits that the Court should grant this petition for rehearing, vacate its order of October 14, 1946, and issue a writ of certiorari to review the decision and judgment of the Oregon Supreme Court denying to the petitioner

rights which have been guaranteed to him under the Federal Law and Employers' Liability Act as Amended.

Respectfully submitted,

FRANK C. HANLEY.
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, Frank C. Hanley, counsel for petitioner, do hereby certify that the foregoing petition for rehearing and motion is presented in good faith and not for delay, and that, in my opinion, same should be granted and order of October 14, 1946, vacated to the end that a writ of certiorari may be issued to the Supreme Court of the State of Oregon (Rule 33 Rev. Rules).

Dated this 29th day of October, 1946.

Frank C. Hanley,
Counsel for Petitioner.